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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 JAVIER AND LETICIA ZAMORA and
21 DANIEL PEREZ and ELIZABETH PEREZ,

22 Plaintiff,

23 vs.

24 WACHOVIA CORPORATION and WORLD
25 SAVINGS BANK,

26 Defendants.

Case No.: C 07-4603 JSW

27 MOTION TO ENTER [PROPOSED]
28 PRE-TRIAL ORDER NO. 1 AND
MEMORANDUM IN SUPPORT
THEREOF

The Honorable Jeffrey S. White

29 Plaintiffs Leticia Zamora, Daniel Perez and Elizabeth Perez (“Plaintiffs”) submit this
30 memorandum in support of their Motion to enter the [Proposed] Pre-trial Order No. 1 (“PTO No.
31 1”) filed concurrently herewith. Entry of PTO No. 1 will, among other things, appoint Plaintiffs’
32 counsel, Bonnett Fairbourn Friedman & Balint, P.C. (“Bonnett Fairbourn”), as Lead Interim Class
33 Counsel.
34

INTRODUCTION AND BACKGROUND

On September 5, 2007, Plaintiffs filed this action individually and on behalf of all other similarly situated minorities who have entered into residential mortgage loan contracts that were originated, financed or purchased by Defendant World Savings Bank (“Defendant” or “World Savings”). Plaintiffs, who each are members of a protected minority group, challenge World Savings’ mortgage pricing policies and procedures that result in minorities receiving home loans with higher fees, rates and costs than similarly situated non-minority borrowers.

On December 5, 2007, an Order of Disqualification in this matter was entered by the Honorable Thelton E. Henderson. The action was reassigned to this Court by Order of December 6, 2007.

On December 11, 2007, this Court entered an Order setting a Case Management Conference and directing the parties to meet through lead counsel and thereafter submit a joint statement pursuant to Federal Rule of Civil Procedure 26(f). The parties’ joint Rule 26(f) report was filed on January 25, 2008.

On February 1, 2008, an initial Case Management Conference was held before this Court. Thereafter, the Court entered a Civil Minute Order on February 4, 2008, which *inter alia*, established a pretrial schedule and directed Plaintiffs to submit a motion for appointment of interim class counsel.

Thus, to ensure the efficient and orderly prosecution of this putative class action and effective representation for the Class, and for the reasons set forth below, Plaintiffs respectfully request the Court to appoint the Bonnett Fairbourn law firm as Lead Interim Class Counsel and enter PTO No. 1.

ARGUMENT

I. BONNETT FAIRBOURN SHOULD BE APPOINTED LEAD INTERIM CLASS COUNSEL.

A. The Court Should Designate Lead Interim Class Counsel Pursuant to Rule 23(g).

Federal Rule of Civil Procedure 23(g) provides that “[t]he court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.” Fed. R. Civ. Proc. 23(g)(3). Such orders are common and are encouraged in complex class actions. *See Manual for Complex Litigation* (Fourth ed.) §10.22 (recommending special procedures for coordination of counsel early in complex litigation). Appointment of interim leadership for the putative class at this stage will assist to streamline prosecution of the litigation, eliminate unnecessary costs and delays, expedite the proceedings and result in the best resolution for the proposed class. *See Manual for Complex Litigation* (Fourth ed.), §22.62 (“Early organization of counsel . . . is a critical case management task.”).

Appointment of interim class counsel is particularly warranted because the parties are currently exploring the prospect for an early resolution of this case. *See* Advisory Committee Notes to Fed. R. Civ. Proc. 23(g) (“Settlement may be discussed before certification. . . . [A]n attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable and adequate for the class.”); *Manual for Complex Litig.* (Fourth ed.), §21.11 (“designation of interim counsel clarifies responsibility for protecting the interests of the class during pre-certification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement”).

B. Bonnett Fairbourn Should Be Approved as Lead Interim Class Counsel.

Judicial economy, efficiency and justice will be best served by the appointment of Bonnett Fairbourn as Lead Interim Class Counsel in this action and in any subsequent related and consolidated actions as detailed in PTO No. 1. The Bonnett Fairbourn law firm possesses the collective knowledge, experience and resources necessary to effectively lead this case, and it is well-established that the Court may appoint lead counsel to coordinate the prosecution of complex cases such as the instant action. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774-5 (9th Cir. 1997) (courts routinely exercise authority to appoint lead counsel for plaintiffs); Advisory Committee Notes to Fed. R. Civ. Proc. 23(g) (“the selection and activity of class counsel are often critically important to the successful handling of a class action.”).

Rule 23(g) sets forth the criteria for appointment of interim class counsel:

(1) * * * In appointing class counsel, the court

(A) must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action,
- (ii) counsel’s experience in handling class actions, other complex litigation, and the type of claims asserted in the action,
- (iii) counsel’s knowledge of the applicable law, and
- (iv) the resources counsel will commit to representing the class; [and]

(B) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class[.]

Fed. R. Civ. P. 23(g)(1)(A)-(B). Bonnett Fairbourn easily satisfies these elements and will fairly and adequately represent the interests of the Class.

Before filing this case, Bonnett Fairbourn expended considerable resources to investigate the conduct that World Savings is alleged to have committed. These pre-suit efforts included extensive legal research, reviewing documents and consulting with experts regarding the strengths of the potential claims against Defendant. Bonnett Fairbourn has devoted substantial time, effort and resources researching and investigating the facts and legal issues underlying the claims in this case. The firm has retained experts with expertise in the performance of statistical studies and analyses, and other experts with special knowledge and expertise pertaining to the lending industry. In sum, Bonnett Fairbourn is thoroughly prepared and poised to act as Lead Interim Class Counsel and begin discovery in this action.

Bonnett Fairbourn and its co-counsel continue to investigate residential mortgage lending companies' practices. As a result, Bonnett Fairbourn and co-counsel have brought similar class action cases against other residential mortgage lending companies and are currently prosecuting these cases.¹ On January 8, 2008, Bonnett Fairbourn was named in this District as one of two law firms to serve as Co-Lead Interim Class Counsel in the *In re Wells Fargo Residential Mortgage Lending Discrimination Litigation*, Lead Case No. C 07-03880 MMC (N.D. Cal.), a comparable lending discrimination action which was pending before Judge Jenkins and has recently been transferred to Judge Chesney. In short, Bonnett Fairbourn's knowledge of the relevant facts and issues in this case, and its concurrent leadership role in other similar cases, make it ideally suited

¹ These cases include, without attempting to be exhaustive, *In re Wells Fargo Residential Mortgage Lending Discrimination Litigation*, Lead Case No. C 07-03880 MMC (N.D. Cal.); *Garcia v. Countrywide*, Case No. CV07-01161-VAP-JCR (C.D. Cal.); *Payares v. Chase Bank*, Case No. CV07-05540-ABC-SHx (C.D. Cal.); *Toruno v. Decision One/HSBC*, Case no. CV07-05998 AG (ANx) (C.D. Cal.); and *Burns v. Washington Mutual Bank*, Case No. CV 08-00919 EMC (N.D. Cal.).

1 to expeditiously and zealously represent the interests of Plaintiffs and the proposed Class in this
2 action.

3 **2. Bonnett Fairbourn Has the Necessary Experience and Knowledge of**
4 **the Law to Serve as Lead Interim Class Counsel.**

5 Bonnett Fairbourn is well-qualified to lead and manage this nationwide class action. In
6 the class certification context, courts have held that a class is fairly and adequately represented
7 where counsel is qualified, experienced and generally able to conduct the litigation on its behalf.
8 *See, e.g., In re Agent Orange Product Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993); *In re*
9 *NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 512 (S.D.N.Y. 1996) (class counsel
10 satisfy adequacy requirement where they are able to prosecute the action vigorously).
11 Furthermore, where proposed class counsel demonstrates that they are “ready, willing and able to
12 commit the resources necessary to litigate the case vigorously,” the adequacy requirement is
13 satisfied. *In re NASDAQ*, 169 F.R.D. at 515.
14

15 Bonnett Fairbourn has broad experience in class actions generally. Moreover, the firm has
16 far-reaching experience in the investigation and prosecution of this type of lending discrimination
17 case in particular, having successfully served as Lead, Co-Lead or primary litigation counsel in
18 many complex class action cases.
19

20 Bonnett Fairbourn has developed a recognized practice in the area of complex commercial
21 litigation, including major class actions, and is widely regarded as a preeminent firm representing
22 plaintiffs in class action proceedings. Over the last twenty years, Bonnett Fairbourn has
23 successfully handled more than 100 class action lawsuits, representing consumers and victims in
24 a wide range of class action proceedings, including civil rights, securities and consumer fraud
25 claims.
26

1 Andrew S. Friedman and the Bonnett Fairbourn firm have served as co-lead counsel
2 representing minority policyholders in class action proceedings seeking relief for racial
3 discrimination in the sale and administration of life insurance policies, including an action against
4 American General Life & Accident Company which resulted in a settlement valued at \$250
5 million. As co-lead counsel for the class in another such action, *Thompson et al. v. Metropolitan*
6 *Life Ins. Co.*, No. 00-CIV-5071 (HB) (S.D.N.Y.), Mr. Friedman and Bonnett Fairbourn were
7 instrumental in achieving a settlement on the eve of trial valued at \$145 million.

9 Mr. Friedman and Bonnett Fairbourn were Arizona Counsel for the class in *In re*
10 *American Continental Corp./Lincoln Savings & Loan Sec. Litig.*, MDL No. 834 (D. Ariz.), where
11 plaintiffs successfully recovered \$240 million of the \$288 million in losses sustained by them
12 against Charles Keating and other corporate insiders. Most recently, Mr Friedman served as co-
13 lead counsel in *In re Conseco Life Insurance Cost of Insurance Litigation*, MDL 1610 pending in
14 the Central District of California, which resulted in a class settlement valued at more than \$400
15 million on behalf of insurance policy owners.

17 In addition, Plaintiffs' other counsel in this action are a group of highly regarded firms
18 with considerable experience representing plaintiffs in major class actions nationwide. Plaintiffs'
19 counsel includes the Housing and Economic Rights Advocates, a consumer rights organization
20 with considerable expertise in matters involving alleged racial discrimination and housing rights.
21 This group of committed law firms will likewise serve as a tremendous resource in the
22 prosecution of the case on behalf of the Class.

24 **3. Bonnett Fairbourn Will Zealously Prosecute Claims on Behalf of the**
25 **Class and Has the Resources Available To Do So.**

26 The Bonnett Fairbourn firm has amply demonstrated its ability to devote the resources
27 necessary to represent the proposed Class. As noted above, Bonnett Fairbourn has prosecuted

1 similar claims against other major companies for many years. On nearly every occasion, these
2 cases were protracted, hard-fought class actions that were litigated by some of the most capable
3 defense counsel in the country. Bonnett Fairbourn (and co-counsel) represented the plaintiff
4 classes in these cases on a wholly contingent basis, advanced enormous costs and expenses on
5 behalf of the class members, and litigated these cases tirelessly at the trial and appellate levels,
6 securing many landmark rulings along the way. Bonnett Fairbourn will ensure that all necessary
7 resources, including advancing costs and expenses, are made available for the prosecution of this
8 action.

10 Moreover, while the other firms representing Plaintiffs in this action have proposed
11 Bonnett Fairbourn to serve as Lead Interim Class Counsel, it is anticipated that these other firms
12 will play an active and substantial role in the prosecution of this action. These firms also are
13 among the leading firms in the United States in representing class plaintiffs.

15 **4. Bonnett Fairbourn Is In The Best Position To Coordinate The**
16 **Prosecution Of This Action With Parallel Federal Court Actions.**

17 Bonnett Fairbourn will be able to assist the Court in managing this action by coordinating
18 it with parallel federal court actions. In addition to Plaintiffs in this action, Bonnett Fairbourn and
19 other Plaintiffs' counsel represent plaintiffs in numerous other class actions pending in this and
20 other federal jurisdictions asserting similar claims against different defendants.

21 Bonnett Fairbourn is thus well-positioned to coordinate federal court discovery and
22 motions practice with this Court's management of the present proceeding. Such coordination
23 through plaintiffs' counsel has been recognized as a valuable tool used by federal district courts to
24 ensure the orderly and efficient litigation of complex matters. *See Manual for Complex Litig.*
25 (Fourth ed.), §31.31. Thus, by appointing Bonnett Fairbourn as Lead Interim Class Counsel, the
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1 Court will prevent the needless duplication of litigation efforts in state and federal courts and
2 minimize the risk of inconsistent rulings and jurisdictional conflicts.

3 **5. All Interested Counsel Agree That Bonnett Fairbourn's Leadership as**
4 **Proposed Will Best Protect the Interests of the Class.**

5 Another consideration which favors the Court's approval of Bonnett Fairbourn as Lead
6 Interim Class Counsel is that all interested counsel have agreed that this leadership appointment,
7 as set forth in PTO No. 1, is appropriate and will best protect the interests of this nationwide
8 Class. Courts and commentators have noted that a court should approve proposed leadership
9 where interested counsel agree among themselves as to leadership appointment that will best
10 support the class. *U.S. Trust Co. of New York v. Alpert*, 163 F.R.D. 409, 423 (S.D.N.Y. 1995)
11 (noting that "the court should encourage and approve the selection of [lead] counsel by the
12 agreement of interested counsel in proposed class actions, imposing its own choice only in
13 extraordinary situations."); *see also 3 Newberg on Class Actions*, §9.35 (4th ed.) ("Lead counsel
14 may be designated by consensus of interested counsel, and this selection may be accepted by the
15 court when it makes an appointment. . . . the court should always encourage the parties
16 themselves to agree on lead counsel, while imposing its own choice only in extraordinary
17 circumstances").

18 **6. Bonnett Fairbourn Is Well-Positioned to Comply With the**
19 **Responsibilities Designated by PTO No. 1.**

20 PTO No. 1 designates a number of specific responsibilities to Lead Interim Class Counsel.
21 Specifically, PTO No. 1 instructs Lead Interim Class Counsel to maintain communications and
22 promote harmonious dealings among all Plaintiffs' counsel, provide general supervision of the
23 activities of Plaintiffs' counsel; and perform or delegate as appropriate duties including, *inter*
24 *alia*, briefing and argument of motions, conduct of discovery, appearances at pretrial conferences,
25
26
27

1 consultation with experts, and conduct of settlement negotiations with counsel for Defendant. As
2 demonstrated above, Bonnett Fairbourn is experienced in these areas and is well-positioned to
3 undertake those responsibilities.

4 **II. THE OTHER RELATED TERMS OF PTO NO. 1 ARE APPROPRIATE AND**
5 **SHOULD BE INCLUDED IN THE COURT'S ORDER AS PROPOSED.**

6 In addition to Fed. R. Civ. P. 23(g) appointment of Lead Interim Class Counsel, PTO No.
7 1 contains a number of other terms customarily included in such pretrial orders. These include
8 provisions for:

- 9
- 10 • Application of the Order to Subsequent Related and Consolidated Cases;
 - 11 • Service of Papers; and
 - 12 • Time Recording.

13 These terms, Plaintiffs respectfully submit, should be entered as proposed. Under PTO No. 1,
14 counsel for all parties are directed to cooperate with one another, whenever possible, to promote
15 the expeditious handling of pretrial proceedings in this action. Each of the other directives
16 included in PTO No. 1 are engineered to facilitate the just, efficient and cost-effective prosecution
17 of this litigation.
18

19 CONCLUSION

20 For the foregoing reasons, Plaintiffs respectfully request that the Court enter PTO No. 1,
21 and thereby appoint the law firm of Bonnett Fairbourn as Lead Interim Class Counsel.

22 Dated: March 3, 2008

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CERTIFICATE OF SERVICE

I, Wendy J. Harrison, hereby certify that a true copy of the foregoing document filed through the ECF system will be electronically sent to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants on March 3, 2008.

/s Wendy J. Harrison
Wendy J. Harrison